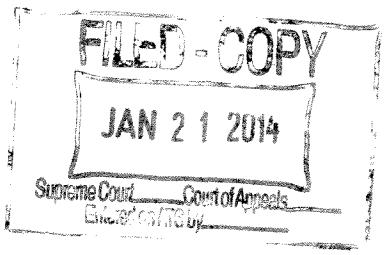
1-21-2014

State v. Eliasen Appellant's Brief 1 Dckt. 41428

IN THE SUPREME COURT FOR THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent vs. DESIREE ELIASEN, Defendant/Appellant.	)	No. 41428-2013 (Bannock Co. CR-2008-17128-MD)



OPENING BRIEF OF APPELLANT

Appeal from the District Court
of the Sixth Judicial District of the State of Idaho
In and For the County of Bannock

HONORABLE STEVEN S. DUNN
District Judge
HONORABLE RICK CARNAROLI
Magistrate Judge

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from a judgment of conviction and sentence, following a jury trial, for second-degree stalking, a misdemeanor. I.C. § 18-7906(1) and (3). The judgment was affirmed on appeal to the district court. R 59. Appellant Desiree Eliasen asks this Court to vacate the judgment of conviction and enter a judgment of acquittal because the evidence was insufficient as a matter of law to show she engaged in repeated acts of nonconsensual conduct involving the complaining witness, a material element of the offense. I.C. § 18-7906(1)(a).

B. *Procedural History and Statement of Facts*

1. Pretrial proceedings

Ms. Eliasen was charged by citation with one count of Second-Degree Stalking in violation of I.C. § 18-7906. R 96. She entered a plea of not guilty. R 105.

On December 12, 2008, Ms. Eliasen filed a motion to dismiss the case for insufficient evidence. R 113. At the hearing on the motion, she argued that the evidence showed that there was not a course of conduct as she was accused of following Lynette Sampson on one continuous occasion on September 26, 2008. T pg. 30, ln. 2-8. The magistrate court, the Honorable Rick Carnaroli presiding, denied the motion noting that "[t]he way the police report reads the argument could be made that there are two acts of following, one from home to Good Will [sic] and the other from Good Will [sic] to the police department[.]" *Id.*, ln. 19-25; R 124.

On February 11, 2009, the state filed a Compliant which alleged, that:

> On or about 26 September 2008, in the City of Pocatello, State of Idaho, the Defendant, DESIREE ELAISEN, knowingly and maliciously engaged in a course of conduct that seriously annoyed, alarmed or harassed Lynette Sampson causing

her to suffer substantial emotional distress by following and/or maintaining surveillance upon Lynette Sampson.

R 160.

On February 27, 2009, Ms. Eliasen filed a Renewed Motion to Dismiss. R 172. The magistrate court denied Ms. Eliasen's Renewed Motion to Dismiss and her Motion for Permission to Appeal the Order Denying Defendant's Motion to Dismiss. T pg. 39, ln. 10-25.

2. Trial proceedings

Lynette Sampson lives at 454 Wyldwood Lane in Pocatello. She is married to Pocatello Police Officer Richard Sampson and they have two young children. T pg. 176, ln. 10-20. On Friday, September 26, 2008, she was planning to go to the Goodwill Store to make a donation and then go to Fred Meyers to shop. T pg. 177, ln. 4-5. At about 12:45 p.m., she and her three-year-old daughter left the house. *Id*, ln. 8 -12. As she was backing out of the garage and driveway, she noticed a brown Blazer stopped in the roadway facing east. T pg. 178, ln. 22-25. She waited a few seconds for the Blazer to move. When it didn't move, she backed onto the road and drove west. T pg. 179, ln. 1-2. The Blazer headed east, did a U-turn and then headed west. T pg. 180, ln. 1-3. Ms. Sampson drove a block and one-half east on Wyldwood, turned south on Meadowbrook, traveled a short block, then turned right onto E. Alameda heading west toward Yellowstone Ave. She did not notice where the Blazer was at this point. *Id.*, ln. 9-24.

Alameda and Yellowstone are both major arterials in Pocatello. Ms. Sampson drove west on Alameda for three blocks and stopped for a red light at Yellowstone. She was in the left turn lane and the Blazer was right behind her. T pg. 181, ln. 5-18.

Ms. Sampson then turned left and drove to the Goodwill Store at 441 Yellowstone Ave,

about one-half of a mile from the intersection. She did not notice the Blazer behind her. T pg. 181, ln. 5-13. When she pulled into the Goodwill, she noticed the Blazer "turned sharply" into the parking lot and then park. Ms. Sampson got out of her car, got some bags out of the trunk, and started walking to the donation door. A Goodwill employee came out to help her with the donations and she stood by the door while the employee took the bags inside. While she was waiting, she saw the Blazer. T pg. 182, ln. 5 - pg. 183, ln. 4. Ms. Sampson identified Ms. Eliasen as the driver of the Blazer. T pg. 183, ln. 18 - pg. 184, ln. 2. At that time she did not know Ms. Eliasen. T pg. 176, ln. 25 - pg. 177, ln. 1. Ms. Sampson left the Goodwill the back way, and turned right on Pine St. This route is safer than taking a left onto Yellowstone because there is a traffic signal at Pine. The Blazer was right behind her at the red light at Pine and Yellowstone. She then turned north onto Yellowstone heading toward the Fred Meyer as did the Blazer. Ms. Sampson then turned right on Cedar St., which is located a long block north of Pine, without signaling. T pg. 184, ln. 10 - pg. 185, ln. 23. The Blazer also turned right. TT pg. 186, ln. 1 - pg. 187, ln. 1.

Ms. Sampson then called her husband, but was not able to reach him. She called again while driving eastbound on Cedar and, after speaking to him, decided to drive to the police station. T pg. 187, ln. 11-18. She turned right from Cedar onto Jefferson Ave, right again from Jefferson onto Oak, and left onto Sherman where the police station is located. T pg. 188, ln. 4-22. Both Jefferson and Oak are main thoroughfares in Pocatello. The Blazer was between two to four cars behind Ms. Sampson as she drove down Jefferson and Oak. The Blazer continued down Oak Street and did not turn down Sherman. T pg. 189, ln. 15 - pg. 65, ln. 5.

Officer Sampson testified that his wife arrived at the police station and told him the

license plate number of the Blazer. T pg. 206, ln. 16. He testified that Ms. Eliasen's "name came back" when he "r[an] that license plate." T pg. 220, ln. 18 - pg. 221, ln. 1.

After the state rested its case, Ms. Eliasen moved for a judgment of acquittal under I.C.R. 29. Defense counsel argued, *inter alia*, that the state had not shown multiple events. T pg. 230, 19-25. The court denied the motion stating that the "course of conduct" required by the statute "can be as little as two acts" and that the jury would have to decide whether there was a single act of following or whether Ms. Sampson stopping at Goodwill was a break between the first and second episodes. T pg. 233, ln. 15-25.

Mr. Eliasen testified that he and Desiree work together selling real estate. Fridays are very busy days for real estate professionals because they need to prepare for Saturday, when most buyers want to look at houses. T pg. 237, ln. 10; pg. 240, ln. 15-24. A typical Friday includes checking on properties listed on the Multiple Listing Service, making sure the flyer boxes at their listings are full and ensuring that their listings look presentable for potential buyers. They also try to locate For Sale By Owner properties to get them to list with them and check on homes in foreclosure or pre-foreclosure. T pg. 241, ln. 2 - pg. 118, ln. 1. On the Friday in question here, September 26, 2008, he was not able to assist Desiree because he was teaching a class at the Pocatello Police Department. T pg. 244, ln. 7-22. Part of the plan for that Friday was for Desiree to view a pre-foreclosure property at 1001 Willow Lane, about a block from Ms. Sampson's house on Wyldwood, and to inspect some of the properties they managed located south of Oak Street. TT pg. 251, ln. 15 - pg. 252, ln. 20. She also had to go to Sign-A-Rama, which is at 215 E. Cedar Street, to pick up a custom sign. Thus, her business tasks for that day took her to the area around Ms. Sampson's house and down to near the police station. In addition to her job-

related tasks, Desiree also had to go to the bank to get cash and make their mortgage payment. T pg. 245, ln. 2 - pg. 246, ln. 7-24.

Another real estate broker and former Pocatello Police patrol officer, Paul Romirell, corroborated Mr. Eliasen's testimony about the daily tasks of a real estate professional. T pg. 278, ln. 1 - 23. He also testified that Yellowstone and Jefferson were main North-South roadways and that Alameda, Cedar, Maple and Oak are all major East-West roads. T pg. 279, ln. 15 - pg. 280, ln. 13.

The jury found Ms. Eliasen guilty. R 270.

3. Sentencing

The magistrate court imposed judgment and placed Ms. Eliasen on 24 months of probation. It imposed 20 days of jail to be served forthwith and ordered an additional 20 days to be served on the labor detail. He also ordered that Ms. Eliasen pay a fine, obtain a psychological evaluation and to follow all recommendations of the evaluator. R 278-279.

A timely Notice of Appeal was filed. R 312. However, no action was taken on the appeal.

4. The District Court Appeal

On August 1, 2012, an Amended Notice of Appeal was filed. That pleading erroneously omitted noting that Ms. Eliasen continued to seek review of the Judgment of Conviction and Sentence. R 11. Current appellate counsel appeared and on February 4, 2013, a Second Amended Notice of Appeal correcting that error was filed. R 15; 22-24.

On appeal, Ms. Eliasen argued that there was insufficient evidence to prove that she engaged in a "course of conduct," defined in the statute as "repeated acts of nonconsensual

contact." I.C. § 19-7906(2)(a). The district court found there was sufficient evidence of more than one act of nonconsentual contact.

> In this case, Appellant appeared outside of the victim's home before any following even occurred. Once following did begin, the victim reached Goodwill, a destination, and Appellant maintained surveillance on the victim at that destination before following the victim a second time after the victim left Goodwill. These facts demonstrate that there is substantial competent evidence to find that Appellant engaged in repeated acts of nonconsensual contact with the victim.

R 76.

The district court upheld the jury verdict and affirmed the judgment. R 88. A timely Notice of Appeal was filed. R 90.

III. ISSUE PRESENTED ON APPEAL

Did the state present sufficient evidence to prove that Ms. Eliasen engaged in a "course of conduct" that seriously alarmed, annoyed or harassed the victim?

IV. ARGUMENT

The State Failed to Present Sufficient Evidence to Prove There Was Course of Conduct That Seriously Alarmed, Annoyed or Harassed the Victim.

A. *Standard of Review*

On review of a decision of the district court, rendered in its appellate capacity, this Court reviews the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008).

The Due Process Clauses of the United States and State Constitutions preclude conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970).

> In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316 (1979). In the case where a properly instructed jury has convicted even though no rational trier of fact could have found guilt beyond a reasonable doubt, that conviction cannot constitutionally stand. *Jackson*, 443 U.S., pg. 318.

While Ms. Eliasen's attorneys made an I.C.R. 29 motion, a criminal defendant need not even move for a judgment of acquittal in order to preserve for appeal the issue of whether there was sufficient evidence before the jury to support a guilty verdict. *State v. Faught*, 127 Idaho 873, 877, 908 P.2d 566, 570 (1995); *State v. Ashley*, 126 Idaho 694, 696, 889 P.2d 723, 725 (Ct. App. 1994). Thus, this issue may be raised upon appeal.

Upon appellate review, this Court must determine, based upon its independent consideration of the evidence, whether there was substantial and competent evidence to support the verdict. *State v. Hollon*, 136 Idaho 499, 501, 36 P.3d 1287, 1289 (Ct. App. 2001). Put in constitutional terms: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S., pg. 319. This is one of those rare cases where the state obtained a conviction even though it failed to meet its constitutional burden.

B. *There Was Insufficient Evidence to Show a Course of Conduct*

Here the state failed to show there was a course of conduct as required by statute. Therefore, this Court should vacate the conviction and enter a judgment of acquittal.

The state charged Ms. Eliasen with that portion of the statute which provides that "[a] person commits the crime of stalking in the second degree if the person knowingly and maliciously . . . [e]ngages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress." R 160. The statute defines the term "course of conduct" to mean "*repeated acts* of nonconsensual contact." I.C. § 19-7906(2)(a) (emphasis added) Examples of "[n]onconsensual contact" under section 2(c) includes appearing at the residence of the victim, as well as "[f]ollowing the victim or maintaining surveillance[.]"

Here, the evidence was insufficient because there was only a single occurrence of non-consensual contact between Ms. Eliasen and Ms. Sampson. And a single occurrence of nonconsensual contact cannot constitute a "course of conduct" under I.C. § 19-7906(1)(a). While there is no appellate opinion addressing this issue, the principles of statutory interpretation require that conclusion. As the Supreme Court has said,

> the objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Schulz, 151 Idaho 863, 866-67, 264 P.3d 970, 973-74 (2011); s*ee, State v. Harvey*, 142 Idaho 727, 730, 132 P.3d 1255, 1258 (Ct. App. 2006) (constructions of a statute which leads to an absurd result are disfavored); *see also State v. Anderson*, 145 Idaho 99, 103, 175 P.3d 788, 792 (2008) ("[T]he rule of lenity states that criminal statutes must be strictly construed in favor

of defendants.").

While the plain language of the statute requires "repeated acts" of nonconsensual contact all the evidence shows, even when taken in the light most favorable to the state, is that Ms. Eliasen drove to Wyldwood Lane and followed Ms. Sampson until Ms. Sampson turned off of Oak Street onto Sherman Street, stopping only for traffic signals and when Ms. Sampson paused at the Goodwill. That is a single instance of nonconsensual contact.

The district court, without citation to supporting authority,[1] was of the "view that a change in the nature of the conduct that a defendant engages in creates a sufficient break in the events to demonstrate a course of conduct through repeated acts on nonconsensual contact with a victim." R 76. And, it found that the "facts of this case amount to not only two instances of prohibited conduct [as found by the magistrate judge], but instead four instances of prohibited conduct[:]"

> First, Appellant appeared at the victim's residence before ever following the victim. Second, Appellant followed the victim to Goodwill. Third, Appellant

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[1] The district court did cite to two Washington State cases, both interpreting the Washington State stalking statute. Revised Code of Washington § 9A.46.110(1)(a) prohibits "intentionally and repeatedly harassing or repeatedly following another person." R 76-77. The Washington Supreme Court has written in this regard, "As we have observed, 'repeatedly' is defined as 'on two or more separate occasions,' meaning district, individual, noncontinuance occurrences or incidents." *State v. Kintz*, 238 P.3d 470, 477 (Wash. 2010). By contrast, the Idaho statute does not define "repeated" as used in subsection 2(a) of section 18-7906, nor does the Washington statute use the term "nonconsensual contact," so the persuasive effect of *Kintz* is nil. However, it may be worth observing that Ms. Eliasen did not repeatedly engage in acts of nonconsentual conduct under *Kintz's* definition of "repeatedly," as there was only one contact. *Accord, City of Seattle v. Meah*, 297 P.3d 69, 72 (Wash. Ct. App. 2011) (Evidence of "separate occasions" insufficient where defendant attempted to talk to complaining witness on bus, continued when he trailed her off the bus and up the street and ended when a third party intervened. "Because no reasonable jury could find that Meah's conduct constituted more than a single, continuous episode of following, the evidence introduced at Meah's trial was insufficient to support Meah's stalking conviction based on two or more separate occasions of following.")

> conducted surveillance on the victim while the victim conducted her business at Goodwill. And fourth, Appellant followed the victim from the Goodwill store nearly the entire way to the police station.

R 84-85. However, this disagreement between the magistrate and the district judge is of no importance because whether there were two or four instances of prohibited conduct there was only one instance of nonconsensual conduct.

First, it is important to note that the statute does not require multiple instances of prohibited conduct. It requires "repeated acts of nonconsensual contact." I.C. § 18-7906(2)(a). Examples of "nonconsensual contact" include appearing at the victim's residence, following the victim and maintaining surveillance. I.C. § 18-7906(2)(c)(i) and (iii). There is only one act of "nonconsensual contact" here even if, as the district court concluded, there was prohibited conduct by waiting at Wyldwood Lane, following to Goodwill, waiting there and then continuing the following. The nonconsensual contact between Ms. Eliasen and Ms. Sampson began at Wyldwood Lane and did not end until Ms. Sampson turned off Oak Street onto Sherman Street. While the type of prohibited contact changed during the course of the nonconsensual contact, there was still only one contact. The district court's use of alchemy to convert a change in the nature of the continuing contact into a separate instance of contact is contrary to the plain language of the statute. Moreover, the district court's interpretation of the statute would lead to the absurd result where the behavior of the complaining witness determines whether there is a single occurrence of contact or multiple instances (and thus criminal liability) simply by pausing while being followed.

The natural reading of the statute is that there can only be a new act of "nonconsensual contact" when there is some break in the original "nonconsensual contact." Without such a

break, there cannot be "repeated acts of nonconsensual contact," as required by the statute. Here, there was no break in the contact. Desiree drove to Wyldwood Street, began the contact when she followed Ms. Sampson to Goodwill, paused when Ms. Sampson shortly paused and then continued following when Ms. Sampson resumed, all without breaking off the nonconsensual contact at anytime. According to Ms. Sampson, there was no time that Desiree left the immediate area nor did Desiree break off contact from the time Ms. Sampson left her home on Wyldwood until they parted ways when Ms. Sampson turned off Oak Street onto Sherman. Only one instance of nonconsentual contact occurred.

This Court must vacate the conviction and enter a judgment of acquittal because this Court cannot determine, based upon its independent consideration of the evidence, that there was substantial and competent evidence to support the verdict. *State v. Hollon*, 136 Idaho at 501, 36 P.3d at 1289. The state's evidence, even when viewed in the light most favorable to the prosecution, is insufficient for any rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364; *Jackson v. Virginia*, 443 U.S. at 316.

V. CONCLUSION

For the reasons set forth above, Desiree Eliasen asks this Court to vacate the judgment of conviction and enter a judgment of acquittal.

Respectfully submitted this 21st day of January, 2014.

Dennis Benjamin
Attorney for Desiree Eliasen

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 21st day of January, 2014, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

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